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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Assessment and Collection)
of Regulatory Fees for)
Fiscal Year 1997)

MD Docket No. 96-186

COMMENTS OF COMSAT CORPORATION

COMSAT CORPORATION

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COMSAT Corporation ("COMSAT") hereby submits its Comments in response to the Federal Communications Commission's February 14, 1997, Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.¹

INTRODUCTION AND SUMMARY

Section 9 of the Communications Act requires the Commission to assess and collect regulatory fees in an amount specified by Congress to recover the agency's costs incurred in conducting four specific types of regulatory activities: enforcement, policy and rulemaking, user information services, and international activities. 47 U.S.C. § 159(a). For Fiscal Year 1997, Congress is requiring the Commission to collect \$152,523,000 in regulatory fees. In the *NPRM*, the agency sets forth its proposed schedule to recover the required amount.

At a minimum, the Commission's obligations under Section 9 require it to explain how the costs allocated to fee categories relate to the benefits conferred by such fee categories. The *NPRM*, however, fails in significant respects to demonstrate either that the agency's costs are

¹ 62 *Fed. Reg.* 10793 (March 10, 1997) ("*NPRM*").

accurately calculated and allocated, or that the fee levels relate to actual regulatory benefits conferred. Indeed, the *NPRM* itself acknowledges at several places (§§ 42 & 43) that the proposed schedule could be improved.

COMSAT estimates that, at the proposed fee levels, its regulatory fee burden would approach \$1.4 million. Such a mammoth fee cannot be justified. It simply is not credible that so much of the agency's staff and budget is devoted to enforcement, policy and rulemaking, user information, and international activities even related to COMSAT, let alone "benefiting" COMSAT. Although COMSAT does not underestimate the task facing the Commission in devising a fair and equitable schedule, COMSAT respectfully submits that the proposed fee schedule is unlawful and unjust in important respects, and should be revised.

In particular, this is the second consecutive year in which the Commission has proposed to assess a "Signatory fee" on COMSAT, ostensibly to recover the regulatory costs the agency incurs in regulating COMSAT's function as Signatory to INTELSAT and Inmarsat. COMSAT continues to believe that the Signatory Fee adopted last year is unlawful; the legality of that fee is currently under judicial review in the United States Court of Appeals for the District of Columbia Circuit in *COMSAT Corp. v. FCC*. The proposed Signatory Fee in this proceeding is legally infirm as well.²

But even if the Commission had the requisite authority to establish a signatory fee, the revision of that fee set forth in the *NPRM* is clearly flawed as a matter of administrative law. The *NPRM* fails to provide *any* explanation of what activities the Commission engages in to incur

² COMSAT expressly reserves any legal arguments it has made either before this agency or in the Court of Appeals in the 1996 proceeding.

such costs. Nor has the FCC attempted to show, as required by the statute, a reasonable relationship between those costs and any benefits to COMSAT from such regulation.

Indeed, the Commission has, in essence, already recognized that the Signatory Fee is flawed. In its 1996 *Report and Order*, the Commission indicated that the Signatory Fee was less than optimal, and announced its intention “to explore alternative means of recovering these costs.” *1996 Report & Order*, ¶ 47. Two Commissioners wrote separately that “it seems inappropriate that these costs should be borne by Comsat alone.”³ The *NPRM* does invite comment on alternatives. But, despite the doubts previously expressed by the Commission, the *NPRM* proposes to increase the total Signatory Fee to a level of \$652,050 – an increase of nearly 40 percent over the 1996 fee level.⁴

Even if the Court were to uphold the 1996 Signatory Fee in whole or in part, the costs associated with the Commission’s regulatory oversight of COMSAT’s Signatory activities should, in all fairness, be borne by all of the principal beneficiaries of those activities, and not by COMSAT alone. To a very substantial degree, the main beneficiaries are competitors of COMSAT, rather than COMSAT itself. In these circumstances, Section 9’s requirement that the fees reasonably relate to benefits requires a reallocation of fees so that these other entities will share in the burden of covering the FCC’s regulatory costs in a manner that better approximates the benefits received.

³ Concurring Separate Statement of Commissioner Rachelle B. Chong In Which Commissioner James H. Quello Joins (July 1, 1996).

⁴ Separate fees of \$326,025 are proposed for COMSAT’s Signatory roles in INTELSAT and Inmarsat, respectively.

COMSAT thus respectfully submits that the proposed Signatory Fee be eliminated, and that the costs of regulating COMSAT's signatory activities be spread out among the principal beneficiaries of its regulation. In addition, the Commission should begin now a systematic evaluation of its fee schedule to ensure that, in the future, all regulatory fees -- including in particular international bearer circuit fees -- reasonably relate to the benefits bestowed by the agency's regulation, and that the proper entities pay their appropriate share of such fees.

I. THE COMMISSION SHOULD NOT READOPT THE UNLAWFUL SIGNATORY FEE FOR FY 1997

COMSAT is currently challenging as unlawful the creation of the Signatory Fee in Fiscal Year 1996 before the United States Court of Appeals for the District of Columbia Circuit.⁵ In the event that the Court were to sustain COMSAT's position, it follows that the Commission could not assess a Signatory Fee in Fiscal Year 1997 as well. The agency would then need to recover those costs from other sources.

The Commission offers no new legal or factual justification for a Signatory Fee in this proceeding, so the fee has no basis beyond that in the record of the 1996 proceeding. If, as COMSAT submits is the case, this fee classification was not lawfully created in the first place, the agency necessarily lacks authority to increase the level of that fee in this proceeding.

Accordingly, a ruling by the Court of Appeals against the FCC with respect to the FY 1996 regulatory fee schedule would negate the proposed FY 1997 Signatory Fee. The Commission could avoid this result, and the corresponding revenue shortfall, by eliminating the

⁵ *COMSAT Corp. v. FCC*, No. 96-1325 (D.C. Cir. filed Sept. 10, 1996).

Signatory Fee at this time. In any event, as shown below, sound policy reasons dictate eliminating the Signatory Fee even if the Court were to uphold creation of the Fee in whole or in part.

II. EVEN ASSUMING *ARGUENDO* THAT SIGNATORY OVERSIGHT IS AN ACTIVITY FOR WHICH THE FCC MAY LAWFULLY COLLECT REGULATORY FEES, THE PROPOSED FEE IS UNLAWFUL BECAUSE IT IS BASED NEITHER ON A REASONED EXPLANATION OF THE COSTS OF SUCH OVERSIGHT NOR A PROPER IDENTIFICATION OF THE BENEFICIARIES

The *NPRM* does not dispute that regulatory fees must be based on the costs incurred by the agency in performing the four types of activities identified in Section 9 of the Act, *and* that such fees must be adjusted so that they are reasonably related to the benefits provided to the payor of the fee by the Commission's activities. Even if the Signatory Fee were lawful, which COMSAT submits it is not, the level of the Signatory Fee proposed in this proceeding has not been justified on the basis of either benefits or costs. In addition, the Commission has erred by continuing to assign to COMSAT alone the burden of recovering regulatory costs associated with COMSAT's Signatory roles.

A. COMSAT Is Not The Exclusive Beneficiary Of FCC Oversight Of Signatory Activity

Section 9 requires regulatory fees to be "reasonably related to the benefits provided to the payor" by the agency's regulation. 47 U.S.C. § 159(b)(1)(A). Even assuming that the Commission lawfully could impose a Signatory Fee, it has made no effort to spread the burden of any "benefits" associated with such oversight to the other regulated entities that "benefit" at least as much, if not more, from the Commission's regulatory oversight of COMSAT. In addition, the

Commission has made no effort to adjust the proposed fee to match, or even approximate, the benefits provided to COMSAT by the purported activities upon which the fee is allegedly based.

Assuming, *arguendo*, that COMSAT derives benefits from regulation in the public interest,⁶ there nonetheless are other regulated entities that benefit at least as much as COMSAT, and probably much more, from the FCC's Signatory-related activities. Competing separate satellite systems and operators of undersea cables, for example, benefit directly from FCC restrictions on entry, extensive rate regulation, and other constraints on COMSAT's activities. These competitors routinely participate in a very vigorous way in FCC regulatory proceedings that deal with COMSAT in its signatory capacity.⁷ Customers of COMSAT's INTELSAT and

⁶ The *NPRM* nowhere purports to identify any particular benefits bestowed on COMSAT from its Signatory regulatory activities. The Commission does not contend that it bestows COMSAT's Signatory status; that status was conferred by Congress, not by the FCC. See *1996 Report & Order* at Paragraph 37 ("COMSAT is the entity that Congress designated as the U.S. signatory to both INTELSAT and Inmarsat"); Brief for Respondents at 22, *COMSAT Corp. v. FCC*, No. 96-1325 ("The Commission has never suggested that it conferred signatory status on COMSAT"). This fact distinguishes the situation here from the ordinary case, in which the Commission confers a clear benefit on a regulatee – generally a license or authorization – subject to the conditions applicable to the service for which the authorization is granted. Furthermore, COMSAT derives little if any unique "regulatory" benefit from its status as a Signatory, as distinct from its status as a common carrier. COMSAT already pays through bearer circuit fees for any benefit it derives from its status as a common carrier. See *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 946 F.2d 168, 174 (2nd Cir. 1991) (distinguishing between COMSAT's Signatory and common carrier functions). Any costs attributable to the oversight of COMSAT in its Signatory status are unrelated to any "benefit" COMSAT derives by voting and participating as the United States Signatory to INTELSAT and Inmarsat.

⁷ For example, PanAmSat has surely benefited from its participation in/instigation of nearly 100 proceedings related to COMSAT's activities. See The Brattle Group, *Economic Implications of the Proposed Hughes-PanAmSat Transactions*, Appendix B-Partial List of FCC Proceedings in which PanAmSat has filed against COMSAT. This list is current through November 1996, but is now several items longer.

Inmarsat services also benefit, as the separate statement of Commissioners Chong and Quello noted in last year's proceeding.⁸

It would, therefore, be appropriate for the Commission to place a fair share of the burden of recovering the costs of Signatory-related regulatory activities on the principal beneficiaries of these activities. To accomplish this objective, COMSAT proposes that the Commission eliminate the Signatory Fee and redistribute the costs associated with regulating COMSAT among the entities that pay international bearer circuit fees and space station fees (including LEO space station fees). This would more appropriately provide for a sharing of costs by the main beneficiaries of the regulation. In this way, the costs currently associated with the Signatory Fee would be borne by industry participants in proportion to the scope of their international telecommunications service offerings. COMSAT, of course, would continue to pay a substantial share through its payment of bearer circuit fees (and through the space station fees paid by its COMSAT General subsidiary for its domestic satellites).

In conclusion, given the apparent absence of a reasonable relationship between the benefits accruing to COMSAT from the FCC's activities in connection with COMSAT's signatory status and the amount of the proposed Signatory Fees, the Commission would be acting arbitrarily if it were to adopt the proposed fee schedule. If the proposed Signatory Fee is not eliminated entirely, it must be reduced and the burden redistributed.

⁸ See Separate Statement of Commissioner Chong ("other carriers who use these facilities benefit as well").

B. The FCC Has Not Provided A Reasoned Explanation Of The Costs Associated With The Purported Signatory Regulation

Section 9 limits regulatory fees to recovering the costs incurred in specific regulatory functions such as “enforcement activities, policy and rulemaking activities, user information services, and international activities.”⁹ Although the *NPRM* estimates that such costs exceed \$1.2 million for Signatory regulatory activities, it fails to provide an adequate explanation of how the agency has arrived at such an enormous figure.

In the 1996 fees proceeding, COMSAT showed that the activities the agency cited as giving rise to “Signatory” regulatory costs either were activities (i) for which COMSAT was already paying a fee or (ii) that could not properly be recovered from COMSAT through Signatory Fees. Specifically, in its 1996 *NPRM*, the Commission cited six COMSAT-related activities which result in costs to the FCC that assertedly justify the proposed fee:

- (1) COMSAT’s “authority to provide services via INTELSAT and Inmarsat;”
- (2) COMSAT’s “authority to participate in the procurement leasing of various INTELSAT and Inmarsat space and stations;”
- (3) COMSAT’s authority “to participate in certain INTELSAT and Inmarsat-associated businesses;”
- (4) COMSAT’s compliance with applicable structural and financial separation rules;
- (5) Participation in Executive Branch instructional process and other oversight Signatory activities and Assembly of Parties meetings; and

⁹ 47 U.S.C. Section 159(a).

- (6) Maintenance "of public files of INTELSAT and Inmarsat governing board and other organization documents."¹⁰

As COMSAT demonstrated in the 1996 proceeding, however, COMSAT already pays fees to cover the costs associated with almost all of these regulatory activities.¹¹ And COMSAT certainly pays at least its fair share of FCC regulatory costs associated with its international services through international bearer circuit fees.

Despite COMSAT's prior explanations of the inadequacies of these categories, the FCC did not address these issues in either the 1996 *Report and Order* or the 1997 *NPRM*. Nor does the FY97 *NPRM* provide any further support for the Signatory Fee. Nor does it further clarify the specific activities that give rise to these alleged costs. Thus, there continues to be no record description of activities for which a regulatory fee is appropriate that even begins to support any level of a Signatory Fee.

The Commission does not dispute that it must also provide a reasonable accounting of the activities upon which it bases its fees and disclose publicly the methodology used in calculating proposed fees. To this end, the *NPRM* asserts that, for Fiscal Year 1997, the agency has used "for the first time . . . cost accounting data to identify our regulatory costs and to develop our FY

¹⁰ 1996 *NPRM*, ¶ 44.

¹¹ For example, the costs related to regulating COMSAT's participation in INTELSAT or Inmarsat activities are already fully recovered through application fees and/or bearer circuit fees. COMSAT already pays fees for Section 214 authorization to provide service via INTELSAT and Inmarsat, and to participate in INTELSAT and Inmarsat procurements. In addition, COMSAT pays a fee in excess of \$80,000 for each launch of an INTELSAT or Inmarsat satellite, even though such sum clearly exceeds the costs of processing an application that typically requires only a two-page FCC order.

1997 fees based upon these costs.”¹² However, the *NPRM* does not disclose, explain, or even *summarize* the accounting system from which it derives the proposed fees in this proceeding. The *NPRM* merely publishes the *results* of the purported cost accounting system. These are merely conclusory numbers having no apparent factual basis. Consequently, parties cannot evaluate the agency’s cost accounting system, suggest improvements, or identify errors.

In the absence of information as to the basis of its proposal, the Commission is functioning under procedures in which parties are held liable without any opportunity to be apprised of the basis for a charge against them. Nothing in Section 9 of the Act relieves the Commission of the fundamental obligation of an administrative agency to engage in reasoned decision-making and to provide a principled explanation for its actions.¹³ The Commission has failed to offer the appropriate cost accounting support for the proposed fees.

III. FOR FISCAL YEAR 1998, THE COMMISSION SHOULD REEVALUATE INTERNATIONAL BEARER CIRCUIT FEES

There has been no showing that the current regulatory fee schedule is related in any principled way to the benefits that the Commission’s regulation provides or the costs of such regulation. However, not all of the problems with this schedule are likely to be corrected in the

¹² *NPRM*, ¶ 7.

¹³ An agency’s failure to respond to specific challenges is fatal if “the points raised in the comments were sufficiently central that agency silence . . . demonstrate[s] the rulemaking to be arbitrary and capricious.” *American Mining Congress v. E.P.A.*, 907 F.2d 1179, 1191 (D.C. Cir. 1990) (quoting *Natural Resources Defense Council v. E.P.A.*, 859 F.2d 156, 188 (D.C. Cir. 1988)). See also Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 Rutgers L.Rev. 313 (1996) (explaining that if an agency employs a defective process, then its decision is arbitrary and capricious regardless of whether the ultimate outcome is arbitrary and capricious).

instant proceeding. In this section, COMSAT identifies several fundamental issues that the Commission should address to ensure that it will establish an equitable regulatory fee schedule in future years. In particular, the Commission should abolish the exemption of non-common carriers from paying international bearer circuit fees. The circuits provided by such carriers are functionally equivalent to those provided by common carriers, and there is accordingly, no reason for the exemption.

In 1996, the Commission declined to require non-common carriers to pay bearer circuit fees, citing a lack of data regarding the number of such circuits "provided directly to end users over non-common carrier international facilities."¹⁴ Stating that the lack of data persists, the *NPRM* proposes to assess the international bearer circuit fee on domestic and international common carriers only.¹⁵ The *NPRM* invites comment on whether non-common carriers should pay the fee as well.¹⁶

The exemption of non-common carriers from the payment of international bearer circuit fees is no longer justifiable. First, the only reason the FCC does not have the necessary data is because it has not required non-common carriers to report circuits. The agency cannot very well rely on an ignorance of its own creation as a basis for not doing what is minimally required to satisfy its legal obligations.

¹⁴ 1996 *Report and Order*, ¶ 65.

¹⁵ The *NPRM* does not explain the apparent dramatic decline in the number of bearer circuits from 1996 to 1997. The 1996 *Report and Order* projected that there would be 228,000 bearer circuit payor units. 1996 *Report and Order*, Appendix B, unnumbered page 2. The current *NPRM*, however, forecasts merely 164,000 bearer circuit payment units.

¹⁶ *NPRM*, ¶ 43.

Second, the FCC should recognize that international circuits provided by non-common carrier satellite and undersea cable facilities are functionally equivalent to those offered by common carriers. From the customer's perspective – the key test of functional equivalence under Commission precedent¹⁷ -- a circuit provided by COMSAT is functionally identical to one provided by a "separate satellite system" or private undersea cable.¹⁸

Consequently, a regime that subjects some circuits to a fee requirement, while exempting others, is not equitable. Today, non-common carrier satellite operators pay no bearer circuit fees, while operators of private submarine cables pay bearer circuit fees only for circuits sold on an indefeasible right-of-use basis or leased to any customer other than an international common carrier authorized to provide U.S. international common carrier services. *NPRM*, Attachment H, ¶ 37. COMSAT, in contrast, pays fees on circuits leased to the larger universe of both carriers and end-users. This is unfair. All providers of bearer circuits (or their equivalent) should pay the same fees.

¹⁷ See, e.g., *Ad Hoc Telecommunication Users committee v. FCC*, 680 F.2d 790 (D.C. Cir. 1982); *Local Exchange Carriers' Individual Case Basic Service Offerings*, FCC 90-270 (July 23, 1990).

¹⁸ The ostensible difference between common and private carriers is, to a material extent, merely a matter of labels. In reality, non-common carrier satellites and undersea cables often offer capacity in a manner that meets the definition of common carriage under *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). See also *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). These carriers fail to pay bearer circuit fees only because of a regulatory label affixed to these carriers years ago without any examination of the real-world circumstances under which they operate.

CONCLUSION

For the foregoing reasons, COMSAT Corporation respectfully urges the Commission to eliminate the Signatory Fee, and to initiate a proceeding to adjust the international bearer circuit fees in a manner consistent with these comments.

Respectfully submitted,

COMSAT CORPORATION

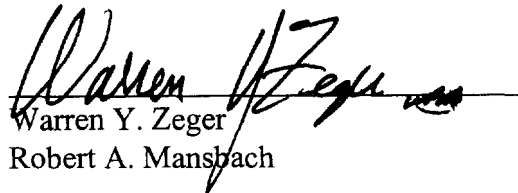
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